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No. 91-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CENTENNIAL, a Utah Corporation, JOHN A. DAHLSTROM, and ARNOLD C. WOOD,

Petitioners,

v.

PLACER DOME U.S. INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

The gravamen of the Petition for Writ of Certiorari ("Petition") is that petitioners Dahlstrom, Wood and Centennial (collectively "Petitioners") want this Court to declare generally that exemplary damages are unconstitutional so that Petitioners are relieved from paying the $1 million in exemplary damages awarded against them.

A. Parties.

Contrary to the statement in the Petition, Respondent, Placer Dome U.S. Inc. ("Placer") is ***not*** a wholly owned subsidiary of "Placer Dome Mining"; rather, Placer is a wholly owned subsidiary of Placer Dome Inc., a publicly held corporation. Other related companies are Placer Pacific L., Placer CEGO Petroleum Division, and Prairie Producing Co.

B. Action Below.

1. Synopsis Of Case Proceedings.

A complete and accurate synopsis of the proceedings in this case, up to the time of entry of the Amended Judgment, is set forth in Appendix[1] B at B-1 to B-6.

2. The Reason Petitioners Were Not Parties To Original Quiet Title Complaint.

Although not stated in the Petition, the Court should note that Petitioners were not parties to the original quiet title action because they had not yet jumped Placer's mining claims ("TOP claims"). The TOP claims were the subject of the quiet title action. After Petitioners jumped the TOP claims by locating their "Top Top Top" mining claims and refused to discontinue their trespass, Placer amended the quiet title complaint. The amended complaint included a claim for an award of exemplary damages against Petitioners due to the intentional trespass by and other malicious conduct of Petitioners.

3. Petitioners' Mis-statements Regarding Lack Of Counsel.

At page 5 of the Petition, Petitioners' claim they were prejudiced because they were unable to obtain

[1] All references to "Appendix" refer to the Appendices attached to the Petition.

new counsel in time to represent them at the damage trial. A brief review of the facts will demonstrate the speciousness of this allegation. Placer filed two motions for partial summary judgment. The first motion was granted as to Placer's paper title to the TOP claims but denied as to the validity or invalidity of underlying, prior-existing mining claims. The second motion was granted in July, 1988, and declared that all underlying, prior-existing mining claims were void prior to the date of location of the TOP claims. The summary judgment rulings left only the issues of damages subject to trial. Counsel for Petitioners withdrew on August 22, 1988. On November 1, 1988, the trial court set the damage trial for April 17, 1989. Petitioners did not attempt to obtain new counsel or copies of the transcripts of the summary judgment hearings until mid-February, 1989.

Petitioners claim it was necessary for them to obtain transcripts of the two hearings before new counsel could be selected. This claim is without merit. All of the evidence considered by the trial court in ruling on the motions for summary judgment was set forth in the extensive summary judgment pleadings. The transcripts contain nothing more than counsels' respective oral arguments pertaining to the summary judgment pleadings and supporting documents. Petitioners have never presented any evidence that they were unable to obtain legal representation for the damage trial because they did not timely obtain transcripts of the summary judgment hearings. For these reasons, the trial court denied the Petitioners' untimely-filed motions for continuance of the damage trial.

On the day scheduled for the damage trial, none of the Petitioners appeared or even had the courtesy to advise the trial court that they would not appear. The trial court recessed the commencement of trial for an hour to give Petitioners the opportunity to appear or make their position known to the court. During that time, the entire jury venire panel, Placer's representatives and attorneys, and the court and court personnel were kept waiting. Ultimately the trial court dismissed the jury venire panel and proceeded to bench try the damage portion of the case, *sans* Petitioners. The injuries of which Petitioners complain might have been partially or entirely avoided had the Petitioners simply chose to appear at trial. Petitioner Dahlstrom was a licensed attorney with more than 23 years of private law practice experience at the time, so at least he and Petitioner Centennial would not have been prejudiced by appearing at trial.

C. Factual Summary Of History Of Mining Claims At Issue.

The history of the various mining claims which at one time or another covered the ground encompassed by the TOP claims is set forth in detail in the Amended Judgment. Appendix B at B-9 to B-18. A brief summary of that history follows.

The TOP claims were located in May, 1974. Numerous other mining claim groups had previously occupied the same ground, but as determined in the Amended Judgment each of those claim groups had been abandoned prior to the location of the TOP claims. Placer acquired the right to explore, develop and mine the TOP claims in 1975. As a result of extensive exploration work over the ensuing six years, Placer discovered the existence of a commercial gold

ore body on the TOP claims. After conducting economic feasibility studies in the early 1980's, Placer announced a plan to expend approximately $75 million to develop the TOP claim ore body (also known as the "Bald Mountain Mine"). In 1984, Placer began the announced development by commencing construction of the mine haul road and the mine pit infrastructure.

Because numerous groups of mining claims had previously occupied the same ground as the TOP claims, Placer commenced a quiet title action in February, 1985. By the end of May, 1985, all existing adverse claims had been resolved. Road construction and mine pit development of the TOP claims progressed during the Spring and early Summer of 1985. Actual mining operations on the TOP claims began in late July of 1985. Based upon unfounded speculation of a flaw in Placer's title to the ground, Petitioners located the Top Top Top mining claims in August, 1985, after actual mining operations had commenced. This intentional trespass began these acrimonious proceedings.

SUMMARY OF ARGUMENT

Petitioners argue that their rights to due process of law were violated because there was insufficient evidence of malicious conduct on their part to warrant an award of exemplary damages against them under Nevada law. The record below, as reflected in Appendix B, contains an overwhelming amount of evidence of Petitioners' malicious and oppressive conduct which fully supports the exemplary damage award.

Petitioners claim that the exemplary damage award against them is excessive and therefore a violation of their rights to due process of law under the 14th

Amendment. To reach this conclusion, Petitioners first claim that attorney's fees were not awarded as compensatory damages. The Amended Judgment belies this claim. As a result, the actual ratio of exemplary damages to compensatory damages is approximately 5:1, not the skewed ratio claimed by Petitioners on account of their fictitiously calculated compensatory damages. Petitioners also support their allegation of excessiveness by claiming that the trial court failed to adhere to any standards in determining the amount of exemplary damages. Again, however, the Amended Judgment belies this claim. The trial court listed five specific criteria which the Nevada Supreme Court established for the purpose of enabling the proper determination of exemplary damages. These standards comport with the due process requirements announced by this Court which are requisite in determining damages. The trial court observed each of these criteria, except those not applicable to the circumstances of the case or those which were dependent upon evidence which the Petitioners refused to supply after being ordered to do so.

Petitioners argue that they were not afforded certain rights prior to the entry of judgment and therefore were deprived of their rights to due process of law. The record demonstrates that this argument is factually and legally false because (1) Petitioners received a trial on liability issues in the form of two hearings on two motions for summary judgment, at both of which Petitioners failed to supply any evidence to demonstrate the existence of a genuine issue of material fact; (2) Petitioners did not have the damages against them determined by a jury because Petitioners voluntarily refused to attend the damage

trial; (3) Petitioners' motion to amend the original judgment resulted in an Amended Judgment which reduced the original judgment in excess of $350,000, demonstrating due consideration of Petitioners' claims by the trial court; and (4) Petitioners fully briefed and orally argued their appeal to the Nevada Supreme Court; simply because that court found that their appeal was without merit does not imply that Petitioners were not accorded their due process rights.

ARGUMENT

A. There Is Substantial Evidence Of Malicious Conduct Of Petitioners Sufficient To Support The Award Of Exemplary Damages.

Petitioners allege there is no evidence to support the judgment that Petitioners' trespass was "negligent, careless, deliberate, carried out in bad faith, done with malice towards the rights of Placer and with the intent to be oppressive to Placer." Petition at 6. A review of the relevant portions of the Amended Judgment utterly repudiates this allegation. See Appendix B at B-9 to B-18.

The following is a brief summary of just a portion of Petitioners' malicious conduct. The entire basis for Petitioners' claim to the ground at issue is Petitioners' argument that certain mining claims, known as the Pioneer claims, which were located in 1940 and covered much of the same ground as the TOP claims, were still valid at the time the TOP claims were located. The Petitioners argued that if the Pioneer claims were still valid in May, 1974, the TOP claims were invalid *ab initio*. Concomitantly, if the TOP claims were initially invalid, then the ground covered by the TOP claims was open to new mining claim

locations when the Pioneer claims were later abandoned. Petitioners' argument totally ignores the facts contained in the public record, the testimony of Petitioners' sole percipient witness, and applicable statutory and case law.

At his deposition, Petitioner Dahlstrom testified that Petitioners' claim of seniority of title relied "solely" upon the April 4, 1985 affidavit of Mr. John Boundy. That affidavit indicated that the assessment work was done on the Pioneer mining claims even though no proofs of labor had been recorded for more than thirty years. However, during his deposition, Mr. Boundy admitted that his April 4, 1985 affidavit and two other affidavits[2] were false in many substantive particulars. The three Boundy affidavits do not allege that any assessment work was done between 1950 and 1973. At his deposition, Mr. Boundy was adamant that no assessment work was performed on the Pioneer claims after 1950 until 1973. None of the Boundy affidavits materially complies with federal or state statutory requirements pertaining to assessment work; those affidavits do not (i) identify the value of the labor or improvements allegedly performed, (ii) when the work was done, (iii) to which mining claims the work pertains, (iv) the character of expenditures, labor or improvements, (v) the claim or part of the claim affected by the work, (vi) the year(s) for which the labor was made or the dates made, or (vii) the name of the

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[2] On April 4, 1985, January 2, 1986 and January 15, 1987, a Mr. Gregory Chachas (an originally named defendant in this case) prepared affidavits for Mr. Boundy which contained substantially false information. Mr. Boundy testified that he did not read these affidavits carefully and that he signed them because he relied on Mr. Chachas. Appendix B at B-12 to B-13.

claim owner or the names of the persons who performed the work. Such information is required by N.R.S. 517.230(1) and 30 U.S.C. §28. Furthermore, Mr. Boundy agreed that many of the statements contained in his three affidavits were false. The Boundy affidavits were not recorded within the 60 day statutory period after the work was allegedly performed—indeed, they have never been recorded. Other than the April 5, 1985 Boundy affidavit, Petitioners acknowledged there were no facts known to them which would support the claimed validity of the Pioneer claims as of 1974.

In spite of Petitioner Dahlstrom's deposition statement that some of the alleged annual labor performed by Boundy was "filed as required" by Nevada Statutes, no proofs of labor for the Pioneer claims were recorded in White Pine County for the assessment years ending in 1950 through 1979, until March 27, 1985. These belated recordings were made more than a month after Placer commenced this action. At that time, Mr. Chachas recorded proofs of labor for the years 1973, 1974, 1977, 1978 and 1979. All those proofs of labor were signed by Mr. Boundy. Mr. Boundy did not sign some of those proofs until March, 1985. The proofs contained false information as to what work was performed and when it was performed. Mr. Boundy testified that this false information was made up by Mr. Chachas without consultation with Mr. Boundy. Mr. Boundy did not do some of the work described in those proofs. Although he signed the 1979 proof of labor, Mr. Boundy was not even on the Pioneer claim ground in 1979. Mr. Boundy did not know or recognize any of the names of the "witnesses" who witnessed his signature

on those proofs of labor. Although Mr. Boundy claimed to have performed some assessment work on the Pioneer claims during several of the summers in the mid-1970's, he could not recall who did the work, what work was done, where the work was done, the value of the work, or how any work actually done benefitted or improved any of the Pioneer claims. Petitioners offered no evidence to buttress the inadequate proofs of labor or Mr. Boundy's memory. During the 1950's, 1960's and up until November 1972, Mr. Boundy occasionally prospected the ground covered by the old Pioneer claims without any authorization from anyone and for his own account, thus recognizing the "open to location" status of the area.

In spite of the fact that all of the foregoing information was of record or known by or available to the Petitioners, they continued to pursue their claims to the ground covered by the TOP claims. In essence, Petitioners perpetrated a fraud scheme designed to use false affidavits and factual claims in an effort to oust Placer from the mine which it discovered or to extort money to settle their "claims". It is clear from this and other evidence described in Appendix B that there is no merit to the Petitioners' allegations that there was no evidence before the Trial Court of their negligent, careless, malicious, and oppressive conduct at the time of entry of the Amended Judgment. Accordingly, the Petition does not present this Court with a factual scenario which would support a claim that Petitioners' rights to due process of law were violated by the award of exemplary damages against them.

B. The Exemplary Damages Awarded Against Petitioners Are Not Excessive, Thereby Depriving Petitioners Of Their Rights To Due Process Of Law Under The 14th Amendment To The United States Constitution.

1. The Ratio Of Exemplary Damages To Compensatory Damages Is Approximately 5:1.

One of the several arguments in the Petition is that the $1 million exemplary damage award against Petitioners is so excessive it constitutes an unconstitutional violation of Petitioners' due process rights. This argument is premised on a false factual claim that the Amended Judgment awarded Placer attorney's fees and costs in the amount of $175,087.19. This statement is untrue. The Amended Judgment awards that amount ***as damages*** incurred by Placer as a result of Petitioners' trespass, not as an award of attorney's fees and costs. *See*, Appendix B at bottom of B-35[3]. Both the trial court and the Nevada Supreme Court determined that the attorney's fees and court costs incurred by Placer as a result of the Petitioners' conduct were compensatory "damages" incurred by Placer in the same sense as Placer's loss of its employees' time as a result of the Petitioners' conduct.

Petitioners' prevarication is critical to their argument in Part C.3 of the Petition that the amount of exemplary damages awarded by the trial court is ex-

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[3] The re-printed Amended Judgment contained in Appendix B is erroneous at the bottom of page B-35. The last complete sentence on that page, in the actual Amended Judgment, reads: "Of course, the attorney's fees here were not awarded under this statute; they were awarded as damages." (Emphasis supplied).

cessive because it is such a large multiple of compensatory damages. While Petitioners are correct that $1,000,000 is many times the sum of $11,910, that is not the amount of compensatory damages awarded in the Amended Judgment. Rather, if a compensatory/exemplary damage comparison is to be made, the correct amounts are $1 Million to $186,997, a ratio of barely more than 5:1. Placer has not been able to find any judicial authority in the United States which has found such an award ratio "excessive", at least in the constitutional sense, and Petitioners have cited none.

2. The Criteria Not Considered By The Trial Court In Determining Exemplary Damages Were Not Necessary To Provide Petitioners Any Rights Under The 14th Amendment To The United States Constitution.

The trial judge carefully limited the amount of exemplary damages he awarded, making the following statement:

> "As counsel are aware, there's been a great deal of discussion about caps on punitive damages in certain types of tortious conduct in the state of Nevada. I am mindful of the concern for that. But I am also mindful of the reason why punitive damages should be awarded in cases such as this where there has been a flagrant and malicious violation of the rights of others." Transcript of April 17, 1989 Trial at 64.

The Nevada Supreme Court, in affirming the trial court's exemplary damage award, was also mindful of its prior decisions pertaining to the issue of excessive exemplary damage awards. The recent Nevada cases of *Ace Truck and Equipment Rentals, Inc. v.*

Kahn, 103 Nev. 503, 746 P.2d 132 (1987) and *Ainsworth v. Combined Insurance Co.*, 104 Nev. 587, 763 P.2d 673 (1988) were applied by the trial court, analyzed at length in both Petitioners' and Placer's briefs to the Nevada Supreme Court, and argued to the Nevada Supreme Court by Petitioners. Those cases hold that five factors should be considered in determining the amount of exemplary damages to be assessed:

1. the vulnerability of the injured party;
2. the financial position of the offending party;
3. the culpability and blameworthiness of the offending party;
4. the offensiveness of the punished conduct when compared to societal values of justice and propriety; and
5. the effect of the award as a means to deter future misconduct.

(a) Vulnerability of Placer was not an applicable criteria; nevertheless, Placer was vulnerable to serious financial consequences as a result of Petitioners' conduct.

As noted by the trial court, a careful review of *Ainsworth* shows that "plaintiff's vulnerability should be weighed when the offending party is in a superior financial position relative to the offended party, i.e., be viewed as an aggravating circumstance, not be viewed as a mitigating circumstance in a situation where, as here, the offended party is in a superior financial position relative to the offending party." Appendix B at B-41. Thus, it was not necessary to consider the vulnerability of Placer in this case because

such consideration would be used to increase the punishment, not to mitigate the award against Petitioners. *See also*, Appendix C at C-21 to C-22.

However, if Placer's vulnerability were at issue, Petitioners' argument is incorrect that Placer is not vulnerable because it allegedly had a net worth of $900 million. That net worth was very significantly affected by Petitioners' claims to all of the ore in the Bald Mountain Mine. Using Petitioners' numbers at page 4 of the Petition and a price of $400 per ounce for gold (the approximate price of gold during the years at issue), the value of the Bald Mountain Mine was $142,310,400 ($69,600,000 + [181,776 ozs. * $400 = $72,710,400]), or 16% of Placer's net worth. To claim that Placer was not "vulnerable" when faced with such a significant financial threat is to ignore reality. Had the trial court considered Placer's vulnerability, Petitioners' cause would not have been helped.

(b) Consideration of the Petitioners' respective financial positions was not necessary, particularly because they refused to provide discovery or testimony on their finances.

Consideration of the financial position of the offending party [Petitioners] is not necessary in the determination of the amount of exemplary damages. As noted in *Hotel Riviera Inc. v. Short*, 80 Nev 505, 396 P.2d 855 (1964), ". . . it is not essential to show the defendants' wealth in seeking exemplary damages." 80 Nev. at 520. *See also, El Rancho, Inc. v. First National Bank*, 406 F.2d 1205, 1218-1219 (9th Cir. 1968); *Clark v. Bunker*, 453 F.2d 1006, 1012 n.11 (9th Cir. 1972). In this case, the sole reason the financial condition of the Petitioners was not consid-

ered by the trial court was the refusal of the Petitioners to comply with discovery requests and orders on that subject as well as their failure to appear and be available to give testimony at the damage trial. The judicial system cannot be faulted for the intentional wrongdoing of the Petitioners. *See also*, Appendix C at C-18 to C-21.

In summary, the trial court's failure to consider the vulnerability of Placer or the respective financial positions of Petitioners was not error of a constitutional magnitude.

3. The Award Of Attorney Fees As Compensatory Damages Does Not Constitute An Award Of Exemplary Damages, Making The Exemplary Damages Excessive Under The Constitution.

Equally without merit is the Petitioners' argument that the award of approximately $162,000 in compensatory damages to Placer for the amount of attorney fees it had incurred to the date of the damage trial constitutes an award of exemplary damages. Nevada case law provides that attorney's fees may be awarded as compensatory damages if the fees are incurred in removing a cloud on title. *Day v. West Coast Holdings*, 101 Nev. 260, 699 P.2d 1067 (1985); *Summa Corp. v. Greenspun*, 98 Nev. 528, 532, 655 P.2d 513 (1982). In this case, the award was made to compensate Placer for the expenses it incurred in having to remove the cloud on its title to the Bald Mountain Mine imposed by the Petitioners. The award did nothing other than make Placer whole, and it did not provide a windfall to Placer. Petitioners have been ordered to do nothing more that compensate Placer for the damages they caused by their abusive and frivolous conduct. *cf., Chambers v. NASCO, Inc.*,

___ U.S. ___ , 111 S.Ct. 2123, 59 U.S.L.W. 4595 (No. 90-256; June 6, 1991). For the trial court to have done otherwise would send a signal to all persons committing a trespass that they would be free to do so without fear of paying for the damages they cause. There can be little doubt that the Nevada's judicial decisions in other cases were made to avoid such injustice. See, *Sun Realty v.District Court*, 91 Nev. 774, 542 P.2d 1072 (1975); *City of Las Vegas v. Cragin Industries*, 86 Nev. 933, 478 P.2d 585 (1970). Again, Petitioners have not raised a constitutional issue.

C. Petitioners Have Received All Of The Constitutional Protection To Which They Are Entitled With Respect To The Exemplary Damage Award.

Petitioners complain that they have not received the "full panoply" of Nevada's procedural protection because "there was no trial on the question of liability, no jury or jury instruction, no post verdict hearing to insure meaningful and adequate review, and no evidence of application of standards by the appellate court to insure reasonableness". Petition at 10-11. This statement is patently false.

1. The Summary Judgment Motion Proceedings Constitute The Liability Trial.

The trial on the question of liability occurred through the filing and hearing of two motions for partial summary judgment and the granting of the second motion. Petitioners had the opportunity to present only minimal evidence to establish "a genuine issue of material fact" to prevent the entry of summary judgment. Petitioners failed to do so. Rule 55 of both the Federal and Nevada Rules of Civil Procedure authorize such "trials". Unless those rules are

declared unconstitutional by this Court, then Petitioners have not raised a viable constitutional issue for this Court's consideration.

2. The Petitioners Waived Their Right To A Jury Damage Trial By Failing To Appear At The Trial Where A Jury Venire Panel Was Waiting.

At the damage trial, there was a jury venire panel available from which a jury was to have been selected to determine whether exemplary damages should have been awarded against Petitioners. The Petitioners intentionally failed to appear for that trial and therefore waived the opportunity to have a jury consider whatever defenses they might have had to Placer's claims for exemplary damages. The judgment entered in this case was by a judge with more than two years' experience with the facts, law, pleadings and conduct of the parties in this case. Petitioners have not cited any judicial authority which provides that a judge is not competent to hear and consider evidence and render a judgment based thereon. Again, Petitioners have not raised a viable constitutional issue for this Court's consideration.

3. The Petitioners Received Constitutionally Adequate Review Of Their Claims.

Petitioners timely moved to amend the original judgment entered by the trial court. After the filing of briefs and lengthy consideration, the trial court partially granted the motion by reducing a portion of the punitive aspect of the judgment by more than $360,000. Appendices C and D. It belies the facts to state that the Petitioners were not provided with a post judgment hearing to insure meaningful and adequate review.

The Nevada Supreme Court, after reviewing the briefs of the parties as well as the Amended Judgment and hearing oral argument, unanimously found the Petitioners' claims to be without merit. Appendix A. Had the Petitioners desired a more lengthy opinion from the Nevada Supreme Court, they were free to request reconsideration of the court's order dismissing the appeal for lack of merit. Petitioners did not do so. This tactic, voluntarily chosen by Petitioners, should not now be allowed to be cited as evidence to support of Petitioners' allegations that they have not received adequate review. As with the preceding points, Petitioners have failed to raise a constitutional issue.

D. The Award Of Attorney's Fees And Costs As Compensatory Damages Was Not In Violation Of Nevada Case Law Or Statutes.

Petitioners state that the courts below awarded attorney's fees in violation of N.R.S. 18.010. No award of attorney's fees was made. As noted by the trial court and affirmed by the Nevada Supreme Court, attorney's fees and costs may be awarded as damages in slander of title actions. *Day v. West Coast Holdings*, 101 Nev. 260, 265, 699 P.2d 1067 (1985); *Summa Corp. v. Greenspun*, 98 Nev. 528, 532, 655 P.2d 513 (1982). The Amended Judgment states that the award of the attorney's fees was an award of damages, not as an award of attorney's fees under N.R.S. 18.010. Appendix B at B-35.

Petitioners also state that the exemplary damage award in this action is in violation of an amendment to the Nevada Revised Statutes passed in 1988(*sic*). Actually, Nevada amended its exemplary damage statute in 1989, effective May 30, 1989. Statutes of Ne-

vada, Acts of 1989, Ch. 218. Although the original judgment was entered in this case on June 5, 1989, the *decision* awarding exemplary damages was entered on April 17, 1989. Section 4 of the statutory amendment provides "[t]he amendatory provisions of this act do not apply to any cause of action where the trier of fact has made a decision to award exemplary or punitive damages before the effective date [May 30, 1989]." Statutes of Nevada, Acts of 1989, Ch. 218, §4. As a result, this argument by Petitioners is not only wholly without merit, it is contrary to the very statute cited in support of their argument.

E. Sufficient Standards For Determining The Amount Of Exemplary Damages Exist Under Nevada Law To Make The Exemplary Damage Award In This Case Constitutionally Firm.

1. Nevada's Exemplary Damages Standards Were Adhered To In This Case.

Petitioners argue that the standards for determining the amount of exemplary damages, as established in *Ace Truck, supra.*, were not observed by the trial court. However, the trial court specifically cited and applied *Ace Truck* in the Amended Judgment. Appendix B at B-37 to B-39; Appendix C at C-18 to C-22. The affirmance of the Amended Judgment hardly supports Petitioner's claim that the Nevada Supreme Court did not consider its prior decisions. As noted by the trial court:

> "In *Ace Truck* the 'financial annihilation' rule, the 'shock the conscience rule', and the 'passion and prejudice' rules of appellate review of punitive damages awards are replaced with the following rule:

> 'Punitive damages are legally excessive when the amount of damages awarded is *clearly disproportionate* to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent, or malicious conduct of the tort feasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is *reasonably necessary and fairly deserved* in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.' (Emphasis added) *Id.* [*Ace Truck*, 103 Nev.] at 509.

"The Nevada Supreme Court then tells how a reviewing court may arrive at the ultimate judgment of where excessiveness begins:

> '[C]ourts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can properly be imposed in a given case. Relevant circumstances include such matters as *the financial position of the defendant*, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offending(*sic*)[4] party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which

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[4] Again, the re-print of the Amended Judgment in Appendix B is erroneous. The Amended Judgment, as well as the language from *Ace Truck*, reads "offended" party, not "offending" party.

> are judged necessary to deter future misconduct of this kind.' (Emphasis added) *Id.* at 510." Appendix B at B-37 to B-40.

After applying the applicable standards of *Ace Truck*, the trial court concluded:

> "In summary, this Court concludes that punitive damages in the amount of One Million Dollars ($1,000,000.00) should be awarded to Placer against the [Petitioners], jointly and severally. The court concludes that the [Petitioners'] conduct, under the facts present here, in "jumping" Placer's claims, was flagrant, malicious, oppressive and done with conscious disregard to Placer's property rights. When all of the facts were discovered, after substantial effort and expense to Placer, the [Petitioners] continued to assert frivolous and fraudulent defenses. These facts were known to the [Petitioners] or could have been discovered by the exercise of reasonable diligence as they were by Placer's agents and attorneys. After such facts having been exposed, this Court was not surprised by the [Petitioners'] failure to appear for trial. As a trial tactic, their absence at the trial may have been a calculated strategy since a jury may have awarded even greater punitive damages than this Court awarded, in view of the callousness of the [Petitioners]' conduct, the lack of any merit to their purported defenses, and their assertions of having performed assessment work when it would have been impossible for them to do so lawfully.

> Such defenses must be characterized as a sham or a fraud; a public trial would have exposed them as such. Under such circumstances, if any error occurred in the assessment of punitive damages, it may exist in the inadequacy of the punitive damages award in view of the callousness of the conduct of the [Petitioners] and some of their previous associates." Appendix B at B-41 to B-42.

In short, there is no room to argue that the trial court and the Nevada Supreme Court failed to apply reasonable standards to the determination of exemplary damages in this case. Certainly there is no evidence presented by the Petitioners supportive of their claim that the manner of determination of exemplary damages in this case was made in contravention to the due process requirements of the 14th Amendment to the United States Constitution or anything said or intimated in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

2. Nevada's Standards For Determining The Amount Of Exemplary Damages Provide Adequate Constitutional Protection.

The Petitioners argue that Nevada law does not comport with the due process requirements of the 14th Amendment because exemplary damage awards are not subject to reasonable standards of determination in Nevada. Petitioners cite only limited language from concurring opinions, but that language states that only "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process". *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 at 87-88 (1988, O'Con-

nor, J. concurring). The preceding discussion demonstrates that Nevada case law does not permit the "wholly standardless" award of exemplary damages, but rather requires the consideration of specific criteria in determining the amount of exemplary damages. See, Parts 3.b.2 and 3.c above. The ruling on Petitioners' motion to amend the judgment (Appendix C) and the Amended Judgment (Appendix B) demonstrate that the trial court was very careful to observe these criteria in the process of determining the exemplary damage award in this case. Petitioners attack on Nevada law as falling short of due process requirements is not supported by the very Nevada cases cited by Petitioners. Simply stated, this case does not provide this Court with either the facts or law which would allow a due process argument to prevail.

CONCLUSION

In their conclusion, Petitioners intimate that the trial court and Nevada Supreme Court gave "free reign to biases and prejudices", punished the Petitioners selectively, allowed other "guilty" parties to go unpunished, punished unpopular and targeted persons [Petitioners?], and awarded damages having no relationship to the actual harm caused. Petitioners have not provided one scintilla of evidence *in this case* that the trial court or the Nevada Supreme Court (1) acted with bias or prejudice against the Petitioners, (2) punished Petitioners in a manner differently from other defendants in the case below who conducted themselves as the Petitioners did, (3) allowed other defendants in this case to go unpunished for the same conduct carried out by the Petitioners, (4) especially

targeted the Petitioners for punishment [irrespective of the Petitioners' "popularity"], or (5) awarded damages having no relationship to the actual harm caused. Absent a showing ***in this case*** of the judicial misconduct as intimated by Petitioners, this Court cannot constitutionally consider the Petitioners' abstract pleas to do away with exemplary damages. United States Constitution, Article III, Section 2; *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Golden v. Zwickler*, 394 U.S. 103 (1969).

As noted in the foregoing sections of this Opposition, the Petitioners have not established any grounds of a constitutional nature which would warrant further consideration of this case by the Court. Accordingly, Placer respectfully requests an order from this Court denying the Petition for Writ of Certiorari. Additionally, because Placer asserts that the Petition is entirely frivolous, Placer respectfully requests an award of just damages against Petitioners and their attorney of record pursuant to the provisions of Rule 42.2 of the Supreme Court Rules.

Dated this 20th day of August, 1991.

Respectfully submitted,

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